

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEAREVER CO., INC., RESPONDENT

**On Petition for Enforcement of An Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ROSANNA A. BLAKE,
GEORGE B. DU BOIS, JR.,
Attorneys,

National Labor Relations Board.

FILED

FEB 3 1961

INDEX

	Page
Jurisdiction	1
Statement of the case.....	2
I. The Board's findings of fact.....	2
A. Organizational activity begins among the employees and Hearever learns of it.....	3
B. Respondent counters the organizational drive by granting a wage increase, by circulating a petition for a company union, and by threats to close or move the plant	4
C. Respondent discharges union stewards Chisholm and Hedstrom.....	6
II. The Board's conclusions of law and order.....	9
Argument	10
I. Substantial evidence on the record considered as a whole supports the Board's findings that respondent violated Section 8 (a) (1) of the Act by circulating a petition for a company union, by granting a wage increase to discourage union activity, and by threatening to move or close the plant.....	10
II. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8 (a) (3) and (1) of the Act by discharging employees Chisholm and Hedstrom because of their union activities.....	14
A. Chisholm	16
B. Hedstrom	17
C. Summary	19
Conclusion	20
Appendix A	21
Appendix B	22
Appendix C	23

II

AUTHORITIES CITED

Cases:	Page
<i>Coca-Cola Bottling Co. of St. Louis v. N.L.R.B.</i> , 195 F. 2d 955 (C.A. 8).....	13
<i>International Association of Machinists v.</i> <i>N.L.R.B.</i> , 311 U.S. 72.....	12
<i>N.L.R.B. v. Birmingham Publishing Company</i> , 262 F. 2d 2 (C.A. 5).....	12
<i>N.L.R.B. v. Dant</i> , 207 F.2d 165 (C.A. 9).....	15
<i>N.L.R.B. v. Gate City Cotton Mills</i> , 167 F. 2d 647 (C.A. 5)	12
<i>N.L.R.B. v. Geigy Co.</i> , 211 F. 2d 553 (C.A. 9).....	14
<i>N.L.R.B. v. Howard-Cooper Corporation</i> , 259 F. 2d 558 (C.A. 9).....	14
<i>N.L.R.B. v. Idaho Egg Producers</i> , 229 F. 2d 821 (C.A. 9)	14
<i>N.L.R.B. v. Parma Water Lifter Co.</i> , 211 F. 2d 258 (C.A. 9), certiorari denied, 348 U.S. 829....	12, 13
<i>N.L.R.B. v. Pittsburgh Steamship Co.</i> , 340 U.S. 498	16
<i>N.L.R.B. v. San Diego Gas & Electric Co.</i> , 205 F. 2d 471 (C.A. 9).....	12
<i>N.L.R.B. v. State Center Warehouse & Cold Stor-</i> <i>age Company</i> , 193 F. 2d 156 (C.A. 9).....	16
<i>N.L.R.B. v. Valley Broadcasting Co.</i> , 189 F. 2d 582 (C.A. 6).....	13
<i>N.L.R.B. v. West Coast Casket Co.</i> , 205 F. 2d 902 (C.A. 9)	14
 Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 <i>et seq.</i>)	1
Section 8 (a) (1).....	2, 10, 14
Section 8 (a) (3).....	2, 10, 14
Section 10 (e).....	1

**In the United States Court of Appeals
for the Ninth Circuit**

No. 17042

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEAREVER CO., INC., RESPONDENT

**On Petition for Enforcement of An Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*),¹ for enforcement of its order issued against Hearever Co., Inc., referred to herein as Hearever or the Company, on November 25, 1958. The Board's

¹ The pertinent statutory provisions are printed *infra*, pp. 21-22.

decision and order (R. 5-9)² are reported at 122 NLRB 208. This Court has jurisdiction, the unfair labor practices having occurred at the Hearever plant in Castro Valley, California, where the Company is engaged in the manufacture and sale of miniature crystal radio sets.³

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that Hearever interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by circulating a petition for a company union, by granting a wage increase for the purpose of defeating the organizational efforts of the employees, and by threatening to close or move the plant in the event they selected the Union⁴ as their collective bargaining representative. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Chisholm and Hedstrom because of their union activities. The subsidiary facts upon which the Board's findings are based are set forth below.

² References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

³ Respondent admittedly makes substantial sales and shipments in interstate commerce (R. 10; 3, 40), and no jurisdictional issue is presented.

⁴ International Association of Machinists, District Lodge No. 115, AFL-CIO.

A. *Organizational activity begins among the employees and Hearever learns of it*

Hearever began operations in early July 1957, employing some 20 to 30 persons, mostly women (R. 11; 51, 139). In early September, a union other than the one involved herein started organizational activities among the Company's employees (R. 11; 138, 149-150). Mrs. Betty Jayne Remer, Hearever's president, first became aware of these activities about the middle of September when one of its representatives handed her a pamphlet in the parking lot at the rear of the plant (R. 11; 145-146).

About September 13 the Machinists' Union started its organizational drive and scheduled a meeting of employees for September 24 (R. 12; 41-42, 46, 64). On September 23, the Company granted a general wage increase (R. 25; 52). Late in the afternoon of the day of the meeting, one of the employees invited Mrs. Remer to attend it but she declined the invitation (R. 12; *infra*, p. 27).⁵ At the close of work a group of the employees crossed the street to attend the meeting which was held in a cafe directly across from the plant (R. 12; 42, 69). The windows of Mrs. Remer's office overlooked the street and the cafe entrance and Mrs. Remer and her secretary, Louise Stewart, watched the employees enter the cafe and exchanged remarks such as "there goes two more" and "what a dirty trick" (R. 12-13; 42, 132-133, 158, *infra* p. 27).⁶

⁵ Portions of the transcript of evidence which were omitted from the Record Appendix are set forth *infra*, pp. 25-29.

⁶ Although Mrs. Remer may not have been in the office at the moment the employees left the plant, the testimony

At the meeting, most of the employees signed union authorization cards and employees Sharon Chisholm and Mary Hedstrom were elected shop stewards (R. 12; 46, 70-71, 98). As set forth *infra*, pp. 6-9, Chisholm and Hedstrom were discharged on October 1.

In the meantime, on the day following the union meeting, Hearever's attorney addressed the employees at the plant and explained their rights under the Act to engage in or to refrain from engaging in union activity (R. 13; 43-45). A copy of his statement was posted on the bulletin board (R. 13; 45).

B. Respondent counters the organizational drive by granting a wage increase, by circulating a petition for a company union, and by threats to close or move the plant

On September 27, 3 days after the union meeting and 4 days after the general wage increase on September 23 (see *supra*, p. 3), the Company announced another general wage increase (R. 25; 52, 177).

During this same period, supervisor Emery⁷ went

of her secretary, a witness for respondent, makes it clear that she was there almost immediately thereafter (R. 12; 157-158). Stewart admitted that she herself "saw the employees go in the [cafe] door" and that she and Mrs. Remer "probably" discussed the meeting while it was going on (R. 13, n. 2; 158, *infra*, p. 29). In a sworn statement given to a Board representative, Stewart stated, "We undoubtedly did discuss this meeting" (R. 158).

⁷ The Board's reasons for rejecting respondent's contention that Norma Emery, or Judy as she is usually referred to in the record, was not a supervisor are set forth fully *infra*, pp. 10-12.

to Mrs. Remer and asked her advice about the formation of a company union (R. 14; 115-116). Mrs. Remer said that Emery could type a heading on a sheet of paper like "We, the undersigned, would like to form our own union" and then "broach the girls and see how they felt about it" (R. 14; 116). If they did not want to sign, Mrs. Remer said, "it would not be held against them" (R. 116). At Emery's request, Mrs. Remer's secretary typed the petition and Emery took it to a number of employees but had no "luck" (R. 23; 116, 118). She left it on her work table at the end of the day and it was gone when she returned the next morning (R. 117).

As set forth *supra*, p. 3, the plant had begun operating only the previous July and, as the employees knew, many of the parts for its miniature radios were obtained from Japan (R. 28; 55). On some unspecified date, Mrs. Remer told supervisor Emery that Mr. Browner, who was one of the directors of the Company, was in Japan "looking over a factory" and stated that the work could be done more cheaply there (R. 28-29; 118-119, 149). Although, as the Board noted, there is no evidence that supervisor Emery repeated Remer's remarks to any employee, they make understandable the employees' concern over the widespread rumor that the plant would close or move in case the Union was successful (R. 29; 55, *infra* p. 24). Two employees questioned Mrs. Remer about the rumor. Mary Preston asked if Mrs. Remer intended to close the plant if the Union came in, and Remer replied, "Yes" (R. 29; 55-56). Perri Nelson testified that when she mentioned the rumor, Remer

laughed and said that it was a ridiculous idea, that she had not said anything like that (R. 30; *infra* p. 24). On another occasion Mrs. Remer told employee Henning that if the "Machinist Union got in there she would have to close down, or that she could go to Japan and she could get the work done much cheaper, and that her parts were made there" (R. 29; 58). Mrs. Remer also told Henning that she "could go down the coast possibly and set up with cheaper labor" (R. 29; 58).

**C. Respondent discharges union stewards
Chisholm and Hedstrom**

Sharon Chisholm and Mary Hedstrom were admittedly two of the Company's top producers, and Mrs. Remer testified that Chisholm's work was "excellent" (R. 17-18; 143, 169-170). In addition, Chisholm admittedly had a very low rate of "rejects" for defective work and supervisor Emery testified that Hedstrom had so few rejects that when she did have one, jokes were made about it (R. 17; 143, *infra* p. 19).

During the coffee break in the plant on the morning of the September 24 meeting, Hedstrom told the other employees about the meeting to be held at the close of work that afternoon (R. 21, n. 7; 41-42 *infra* pp. 23, 24, 25). As set forth *supra*, p. 4, at the meeting Hedstrom and Chisholm were elected the two union stewards. Furthermore, both distributed union authorization cards in the plant during "breaks" and a few days before her discharge, Manager Remer saw Hedstrom distributing cards on the plant parking lot after work (R. 84-85, *infra* p. 26). Sometime

prior to September 20, Mrs. Remer told supervisor Emery that she thought Chisholm and the latter's mother, employee Opal Knapp, were the instigators of the union activity, but shortly thereafter Remer told Emery that she had found out who did start it, that it was Mary Hedstrom (R. 20-21; 113-114).

After lunch on October 1, Mrs. Remer told supervisor Emery that she wanted "to fire Sharon [Chisholm] that night and she had to have a legitimate reason for it" (R. 21; 114-115). Mrs. Remer then asked Emery "to pick a quarrel" with Chisholm and when Emery suggested that Chisholm might not quarrel back, Remer told her, "Well, needle her until she does. I want to fire her tonight" (R. 21; 115). At about 2 p.m. that afternoon, Chisholm was admittedly not at work when Mrs. Remer came up and asked if she was having "another break" (R. 16; 71). Chisholm answered "no" and Mrs. Remer said she thought Chisholm had better get back to work, which Chisholm did (R. 16-17; 71).

At closing time, Manager Remer discharged Chisholm and when asked the reason, answered, "Well, you've been talking too much to Mary Hedstrom . . . Also you talked back to Judy" (R. 14; 72). Chisholm asked Remer when the latter event had occurred and Remer replied, "Well, let me think . . . about two months ago" (R. 14; 72). At the hearing, Manager Remer testified that the only reason Chisholm "was discharged was because of a form of insubordination, in that she had been quite nasty to our floorlady, which is Judy Emery" (R. 22; 47-48). The first instance of insubordination, he testified, was "prob-

ably in August” and the second “came about two weeks after the first offense” (R. 22; 48).⁸ On the other hand, President Remer gave as the cause of Chisholm’s discharge the incident which had occurred a few hours earlier when she had found Chisholm not working, *supra*, p. 7. Chisholm, Remer said, had a cigarette and when she asked if Chisholm had nothing to do, the latter “looked” at her, “exhaled smoke” and answered “not particularly” (R. 16; 144-145).⁹ Mrs. Remer admitted that Chisholm returned to work when told to do so (R. 144). Shortly thereafter, Mrs. Remer directed Manager Remer to discharge Chisholm (R. 16; 144).

Hedstrom was also discharged by Manager Remer at the close of work on October 1 (R. 14; 93). The reason, according to Remer, was “too many rejects” (R. 14; 93). Hedstrom protested that Remer knew “better than that,” asked “if I had so many rejects, why wasn’t I told about it?”, and stated flatly that she did not believe she had had an excessive number (R. 93). “Are you real sure that this isn’t because of union activities?” Hedstrom asked, but Remer said it was not (R. 93). “I think it is,” Hedstrom insisted, “because . . . you did a real good

⁸ Emery testified that several weeks earlier she had complained to Manager Remer that Chisholm was “yelling” at her, and stated that one of them would have to go (R. 15; 103-104). Remer said he would talk to Chisholm, which he did, and Emery had no further trouble with Chisholm (R. 104).

⁹ Smoking was permitted during working hours and Chisholm testified that she might have had a cigarette in the ashtray (R. 16; 77).

job . . . you got all the shop stewards out in one whack" (R. 93).¹⁰

According to respondent, President Remer ordered Hedstrom discharged when a tabulation made on September 30 revealed that she had an "excessive" number of rejects for defective work (R. 15; 145). It is undenied, however, that Hedstrom's work had not only never been criticized but she had been complimented for her good work on several occasions (R. 83, 92). The "tabulation" also showed "rejects" on days when Hedstrom worked in another department because of a burn on her hand (R. 18; 87-88, 60-61). For this and other reasons set forth fully, *infra*, pp. 17-19, the Board found that the Company's tabulation was not a "true and accurate" record of the "rejects" attributable to Hedstrom and her reject rate was not the cause of her discharge (R. 19).

II. The Board's conclusions of law and order

Upon the foregoing facts the Board concluded, as did the Trial Examiner, that respondent violated Section 8(a)(1) of the Act by circulating a petition for a company union, by threatening to move or close the plant if the Union succeeded in organizing the employees, and by granting a wage increase to induce the employees not to join the Union (R. 6, 33-34). It also found, in accordance with the Trial Examiner,

¹⁰ Hedstrom was referring to the fact that on October 1 the Company not only discharged herself and Chisholm, but also employees Knapp and Vieira, who were the assistant stewards (R. 12, 14; 93). Although charges were filed with respect to Knapp and Vieira, the complaint did not allege that their discharge violated the Act.

that respondent discharged employees Chisholm and Hedstrom because of their union activities in violation of Section 8(a)(3) and (1) of the Act (R. 6, 22, 33).

The Board's order directs respondents to cease and desist from the unfair labor practices found and in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act (R. 6-7). Affirmatively, the Board's order directs respondent to offer employees Chisholm and Hedstrom immediate reinstatement, to make them whole for any loss they may have suffered by reason of the discrimination against them and to post the usual appropriate notices (R. 7-8).

ARGUMENT

I. Substantial Evidence On the Record Considered As a Whole Supports the Board's Findings That Respondent Violated Section 8(a)(1) of the Act By Circulating a Petition for a Company Union, By Granting a Wage Increase To Discourage Union Activity, and By Threatening To Move or Close the Plant

Respondent does not appear to deny, as indeed it cannot, that Emery's circulation of a petition for a company union, with the Company's knowledge, violated the Act if Emery was a supervisor, as the Board found. The record, we submit, amply supports this finding.

Emery was the first adult employee hired (*infra* p. 26).¹¹ Her starting rate was \$1.00 an hour, the

¹¹ Respondent's first employees were teenage students (*infra* p. 26).

rate for rank-and-file employees, but President Remer told her almost immediately that the hourly rate was "not for [her]" and she was being made "floorlady" and would receive \$250 a month (R. 24; 100-101, *infra* p. 26). Mrs. Remer also told Emery that she was Mrs. Remer's "assistant and . . . was under management and * * * wouldn't be eligible" to vote in a Board election (R. 137).

Emery was referred to repeatedly as "floorlady" by Manager Remer and other witnesses (R. 47, 64, 67, 72, 83). Indeed, as noted *supra*, p. 7, Manager Remer testified that Chisholm was discharged for a "form of insubordination, in that she had been quite nasty to our floorlady . . . Emery." Emery was admittedly "in charge of quality control" and if an employee was found to have produced a substantial number of defective radios, "Judy would go to the girl" (R. 23-24; 143, *infra* p. 28). Employees took their complaints to her and she made reports on the employees to both Manager Remer and President Remer (R. 24; 143, *infra* p. 29). On occasion she recommended that employees be discharged, some of which recommendations were acted upon by the Company (R. 24; *infra* p. 29).¹²

In sum, the record amply supports the Board's finding that Emery was a supervisor; therefore, her

¹² Respondent erred in stating in its brief to the Board that the only recommendation made by Emery was with respect to Chisholm (R. 102, *infra* p. 29). Its reliance upon the fact that her recommendation as to Chisholm was not accepted ignores the fact that Manager Remer talked to Chisholm about Emery's complaints and Chisholm gave Emery no further trouble (R. 103-104).

conduct in circulating the petition for a company union, with the Company's knowledge, was attributable to respondent.¹³ The record also discloses, as the Board found, that Emery was regarded as a part of management by the employees (R. 43, 62), who would "reasonably assume" that she was acting with the "consent and approbation" of the Company when she solicited them to sign a petition for a company union (R. 24).¹⁴ *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, 80; *N.L.R.B. v. Birmingham Publishing Company*, 262 F. 2d 2, 8 (C.A. 5); *N.L.R.B. v. San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

Similarly, the circumstances surrounding the wage increase granted by respondent a few days after the September 24 meeting fully warranted the Board's conclusion that respondent's purpose was to defeat the Union's organizational efforts. Thus, respondent was aware that its wage scale was low, and at least suspected that the employees' desire for higher wages was one of the reasons for their interest in union representation.¹⁵ Moreover, the increase followed by

¹³ *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 262 (C.A. 9), certiorari denied, 348 U.S. 829; *N.L.R.B. v. Gate City Cotton Mills*, 167 F. 2d 647, 648 (C.A. 5).

¹⁴ See, for example, the testimony of employee Nelson (R. 66), indicating that the rumor that Mrs. Remer was in favor of a company union "could have" resulted from the fact that "Mrs. Emery did bring back a piece of paper and ask us about the company union."

¹⁵ For example, Nelson testified that when she discussed with Mrs. Remer the possibility of forming a company union, she told Remer that she did not think the employees

only a week the one granted on September 23, *supra*, p. 4. Mrs. Remer's explanation for the second increase in so short a period was that the first raise was negligible and hurriedly put into effect before the Company had received its financial statement (R. 26; 147-148). According to Mrs. Remer, the financial statement was received almost immediately thereafter and a second increase was given because the statement was "better" than anticipated (R. 27; 148). However, as the Board noted, Mrs. Remer was unable to state exactly when the financial statement was received; yet respondent offered no documentary corroboration of Mrs. Remer's uncertain recollection of when it was received (R. 27). Nor did Mrs. Remer offer any explanation for granting a hurried increase on September 23, when she was aware that a financial statement would be available shortly. Thus, there is ample record support for the Board's conclusion that the Union meeting on September 24 and wage increase on September 27 were not "unrelated", and that the Company's object in granting the increase was to thwart or discourage union activity by its employees. That its action therefore violated Section 8(a)(1) of the Act is well established. *Coca Cola Bottling Co. of St. Louis v. N.L.R.B.*, 195 F. 2d 955, 957 (C.A. 8); *N.L.R.B. v. Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6); *Parma Water Lifter Co., supra*, 211 F. 2d 258, 262 (C.A. 9); see also

would "go for it" because of the wage scale, and Mrs. Remer protested that the supposed union scale of \$2 an hour was "awfully high" for a company "just starting out" (R. 28; 64-66).

N.L.R.B. v. Idaho Egg Producers, 229 F. 2d 821, 823 (C.A. 9).

It is likewise well settled that threats to close the plant or move it elsewhere, if the employees select a union as their bargaining representative, violate the Act.¹⁶

In sum, then, the record as a whole supports the Board's findings that respondent violated Section 8 (a)(1) of the Act by circulating a petition for a company union, by granting a wage increase to discourage union activity, and by threatening to move or close the plant if the employees selected the Union as their bargaining representative.

II. Substantial Evidence On the Record Considered As a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act By Discharging Employees Chisholm and Hedstrom Because of Their Union Activities

As set forth *supra*, pp. 6-7, Chisholm's work was admittedly "excellent" and she and Hedstrom were two of the Company's top producers. Both, however, were openly active on behalf of the Union in the plant during breaks and, as supervisor Emery's testimony shows, Mrs. Remer at first believed that Chisholm was chiefly responsible for the union activity but later learned that Hedstrom was the "instigator" (R. 113). Chisholm and Hedstrom were the two employees elected union stewards at the September

¹⁶ *N.L.R.B. v. Howard-Cooper Corporation*, 259 F. 2d 558, 560 (C.A. 9); *N.L.R.B. v. Geigy Co.*, 211 F. 2d 553, 557 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 904-905 (C.A. 9).

24 meeting, and employee Nelson testified that their names were "mentioned" when she and Mrs. Remer discussed the union meeting, although she was unable to recall "clearly" whether Mrs. Remer said she knew Chisholm and Hedstrom were "shop stewards—their names were in the conversation but I do not remember exactly in what way" (R. 20; 65).¹⁷ In short, the record clearly discloses that the Company was well aware that Hedstrom and Chisholm were not only active on behalf of the Union, but that Mrs. Remer believed that they were the "instigators" of the organizational campaign. In addition, respondent regarded attendance at the union meeting as a "dirty trick" and sought to defeat the employees' efforts to obtain union representation by various illegal means including threats to close the plant or move to Japan if the campaign was successful.

Moreover, as demonstrated below, respondent's asserted reasons for discharging Chisholm and Hedstrom do not stand up under scrutiny, thereby adding further support to the Board's finding that Chisholm and Hedstrom were discharged because of their union activity. *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9).

¹⁷ Nelson, a witness for the General Counsel, had recently undergone an operation and the bill for about \$350 had been paid by Mrs. Remer (R. 20, n. 6; 148-149). As the Examiner pointed out, Nelson was an "evasive and reluctant" witness who was obviously "not imparting any information she considered adverse to her employer and benefactor, if she could avoid it" (R. 19-20). See also the testimony of Stewart, Mrs. Remer's secretary, that she "might" have refused offers by two employees to furnish her lists of those attending the union meeting because she "already knew" and, as she said, "we didn't need" it (R. 13, n. 2; 154).

A. *Chisholm*

As set forth *supra*, p. 7, it is undisputed that only a few hours before Chisholm's discharge, Mrs. Remer told supervisor Emery that she wanted "to fire" Chisholm that night and wanted a legitimate reason for doing so. Mrs. Remer then asked Emery to "needle" Chisholm so that she would have a reason for discharging Chisholm,¹⁸ and shortly thereafter Remer herself spoke to Chisholm about not being busy and Chisholm allegedly "exhaled smoke" and gave a flippant reply, *supra*, pp. 7-8. Mrs. Remer

¹⁸ In its brief to the Board, respondent vigorously attacked the Examiner's crediting of Emery, pointing out that he recognized that Emery, who was herself discharged after the events here in issue, may have been biased against respondent (R. 19). Furthermore, as noted by the Examiner, some of Emery's testimony supported respondent's contentions such as her frank admission that she had made complaints against Chisholm (R. 19; 103-104). In short, the Examiner concluded that although Emery "withheld nothing" she considered adverse to respondent's interests, it does not follow that she "substituted imagination for memory, invention for fact" (R. 21). Accordingly, the Board properly adopted the Examiner's crediting of Emery's testimony, the credibility of witnesses being primarily a question to be determined by the Examiner. *N.L.R.B. v. State Center Warehouse and Cold Storage Company*, 193 F. 2d 156, 157 (C.A. 9). Nor does the Examiner's crediting in general of the witnesses for the General Counsel and his discrediting of witnesses for respondent evidence bias on his part. *N.L.R.B. v. Pittsburgh Steamship Company*, 340 U.S. 498, 499-500. This is particularly true in this case in which substantial portions of the credited testimony are undenied and there are material contradictions in the testimony of respondent's own witnesses. It is also significant that the Examiner recommended that certain allegations of the complaint be dismissed and the Board agreed (R. 6, 25, 31-32).

thereupon ordered Manager Remer to discharge Chisholm for "insubordination." We submit that it would be difficult to believe that this incident, even as described by Mrs. Remer, constituted sufficiently serious "insubordination" to cause the discharge of an "excellent worker" and a top producer. In any event, it is clear that it was not the cause of Chisholm's discharge since Manager Remer, who actually discharged Chisholm, testified that the only reason for the action was that Chisholm had been "quite nasty" to floorlady Emery, *supra*, pp. 7-8. This had occurred, he conceded, at least two or three weeks, and perhaps nearly two months, earlier. Indeed, as the Board noted, Manager Remer's testimony fails to reveal that he even knew, at the time, of Mrs. Remer's conversation with Chisholm that afternoon, which was cited by Mrs. Remer as the cause of Chisholm's discharge (R. 22).

B. *Hedstrom*

According to respondent, Hedstrom was discharged when a tabulation was made which disclosed that she had an excessive rate of "rejects" for defective work. In concluding that Hedstrom was not discharged for this reason, the Board noted:

(1) *The timing and the nature of the tabulation.* According to Manager Remer, the tabulation was made only the day before Hedstrom's discharge, and such a tabulation was not a "normal procedure" but was done at Mrs. Remer's direction (R. 168). It was limited to work done between September 16 and

30¹⁹ and was further limited to the work of the four "top" employees because that would "give a better cross section" (R. 169-170).

(2) *The accuracy of the tabulation.* A number of facts cast doubt upon the accuracy of the tabulation. In the first place, it shows full production for Hedstrom for days on which, it is undenied, she was working in another department because of a bad burn on her hand (R. 18; 87-88, 60-61). In the second place, as the Board pointed out, some of the notations on the original slips were "in ink, some in pencil on the same slip, not always in the same handwriting, some of the figures were barely legible, and there were some erasures or 'marked over' figures, [and] none of the persons making the notations testified . . ." (R. 17; Respondent's Exhibit 2a-2d).

Furthermore, respondent conceded that rejects can and do at times result from defective parts (for which the employee is not responsible), as well as from poor work, and neither the slips nor the tabulation indicated the cause of the "rejects" (R. 17-18; 105, 160).

(3) *The evidence indicating that Hedstrom's work had been consistently good.* Hedstrom testified, without contradiction, that her work had never been criticized but had in fact been praised on several occasions, *supra* p. 9. Indeed, respondent itself does not assert that it had any cause for complaint about Hed-

¹⁹ Respondent's contention in its brief to the Board that the tabulation was limited to the past 2 weeks only because that was the period for which information was requested by the Board is refuted by the testimony of both of the Remers (R. 150-151, 159, 167-169, *infra* pp. 26-27).

strom's work prior to the tabulation and it is clear that, until it was made, the Company had no reason to believe that Hedstrom had an excessive rate of rejects. In fact, only a few days earlier Hedstrom received a promotion both in wage rate and job classification (R. 21-22; 80-82, 176-178). In addition, Emery testified that Hedstrom's reject rate was so low that when she did make a mistake it was considered a joke (R. 18; 105, 125). Although the Board recognized that not all of the rejects passed through Emery's hands, she was admittedly in charge of quality control and worked at the table at which the rejects were repaired (R. 18; 106-107, *infra* p. 28). In fact, Mrs. Remer testified that if the employees who did the testing found "5 or 6 [radios] that didn't play, they were alarmed and they would go to Judy and Judy would go to the girl" who had produced them (R. 143). As a result, Emery clearly had ample opportunity to observe the quality of the work and it was part of her duty to help employees avoid defective work (R. 18; *infra* p. 28).

On the basis of the foregoing facts, we submit that the Board could fairly conclude that the tabulation did not present an accurate record of Hedstrom's rejects due to poor work and that she was not discharged because of her reject rate (R. 19).

C. Summary

In view of all of the foregoing facts, including the Company's belief that Chisholm and Hedstrom were the "instigators" of the union campaign, its opposition to the Union and the failure of the explanations

for the discharges to stand up under scrutiny, the record as a whole fully supports both the Board's finding that, even if Chisholm was at times annoying and Hedstrom's reject rate was comparatively high, neither was discharged for the reason given, and its further finding that both were discharged instead because of their union activity in violation of Section 8(a) (3) and (1) of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order in full as prayed in the Board's petition.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ROSANNA A. BLAKE,
GEORGE B. DU BOIS, JR.,
Attorneys,

National Labor Relations Board.

JANUARY 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

APPENDIX B

References to Exhibits pursuant to Rule 18(2) (f)
of the Court
(Pages refer to printed record)

I. General Counsel's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1-e	6	8	9
1-g	7	8	9
1-m	7-8	8	9
3-a	48	50	50
3-b	48	50	50
3-c	48-49	50	50
4	53	53	53
5	56-57	57	57
7-a	173	178	179
7-b	173	178	179
7-c	173	178	179
7-d	173	178	179
7-e	173	178	179
7-f	173	178	179

II. Respondent's Exhibits

1	376-377	376-377	377
---	---------	---------	-----

APPENDIX C

Additional portions of the transcript of testimony

Marlene Vieira, a witness for the General Counsel, testified as follows on cross-examination:

(p. 27)

Q. And I believe you said this morning it was Mary Hedstrom who asked you to come to the meeting?

A. Yes.

Q. What time of day was it when Mary asked you this?

A. It was on our break.

(p. 28)

Q. . . . this was in the plant, in the plant itself?

A. Yes.

James Hennings, a witness for the General Counsel, testified as follows on cross-examination:

(p. 85)

Q. Did Mrs. Remer ever say anything directly to you about not joining a union?

A. Yes, sir.

(p. 90)

Q. Wasn't one of her conversations with you to the effect that she knew you had been sent there for employment by the Machinists' Union?

A. No, sir.

* * * *

Q. That was true, though, wasn't it?

A. I was asked by Bill Stadnisky, who knew of a place but he wasn't sure if I could get on there, and he asked me if I would go out and try and tell him if there was anything wrong with the way they were hiring personnel.

(p. 91)

Q. But you did get on?

A. Yes, sir. I lied to get on.

Q. Yes?

A. I went back the next day and told Betty that somebody called me up to have me come out, and all I did was go out on my own and said somebody called me. And nobody sent me out there. I went out on my own.

Perri Nelson, a witness for the General Counsel, testified as follows on direct examination:

(p. 97)

Q. Go ahead.

A. So I told her that Mrs. Emery was very upset because she thought that Mrs. Remer thought that she was the one who had contacted the Machinists' Union in the first place Then I told her that I had heard that if the Machinists' Union did get into Hearever, that she would move the Company to Japan. She just laughed and said that was a ridiculous idea, that she hadn't said anything like that.

Cross-examination

(p. 116-117)

Q. And that meeting at Del's Cafe was the first contact you had had with the Machinists' Union people?

A. That is right.

Q. Who asked you to go over, do you recall?

A. I believe Mary Hedstrom told me there was going to be a meeting on our coffee break that morning.

Q. And did she ask any other people within your hearing?

A. I think . . . I don't remember who I was with, but I think she mentioned it to the people I was having coffee with.

(p. 118)

Q. (By Mr. Rhodes) When you were talking with Mrs. Remer right after that meeting at Del's Cafe . . . was that before or after the Del's Cafe meeting?

A. After.

Q. Was it rather close after that, right immediately after that?

A. I don't remember the exact date. Maybe a week.

(p. 120)

Q. A week or so, in there?

A. Yes.

* * * *

Q. You have already testified about her saying that it was absurd that she was going to close down and move to Japan, didn't you?

A. Yes sir.

Q. But that was a rumor in the plant?

(p. 122)

A. Yes, it was.

Sharon Chisholm, a witness for the General Counsel, testified on direct examination:

(p. 130)

Q. Did you attend any meeting of the Machinists' Union?

A. Yes.

Q. Do you recall the day that you attended that?

A. September 24th.

(p. 131)

Q. How were you informed of this meeting?

A. By Mary Hedstrom.

* * * *

Q. . . . Do you recall when it was she told you about the meeting?

A. It was in the morning. I think it was at break time.

Q. What day, what morning?

A. The same day of the meeting.

(p. 137)

Q. What activities, if any, did you engage in after this meeting, union activities?

A. Just passing out cards.

Q. Passing out what cards?

A. Union cards.

(p. 138)

Q. Where were you at the time?

A. Well, there was sometimes in the plant on our break, also over at the Boulevard Cafe

Betty Jayne Remer, a witness for respondent, testified on direct examination:

(p. 351)

Q. Do you recall, in general, the first crew which manufactured these things during the summer, July and August?

A. My first employees in my plant, other than Judy Emery and my secretary, were teenagers.

Q. These were children who were students at school, were they?

A. That is right.

(p. 356)

Q. While you were manufacturing that first little radio you were paying the wage scale in general of a dollar an hour, when you first began?

A. Right.

(p. 370)

Q. Did you make a tabulation from the original yellow tags of the rejects out of the total production of

Mary Hedstrom from September 16th through September 30th and of her total rejects during that period?

A. The count was made.

(p. 373)

Q. When did next anything come to your attention concerning union activities?

A. The next thing that happened was this date that has been established of September 24th, I believe, in the late afternoon, as I recall, when one of the girls came up to me and said "We are having a union meeting, Machinists' Union meeting, across the street at Del's Cafe, and we were asked to invite our employer." And I declined the invitation

Q. Did you stay around the plant then that afternoon?

A. I can't remember. I may have been there, I may not have been there. I just don't know. I thought I had my hair done that afternoon. I could be confused.

(p. 375)

Q. Were you standing at the window that day trying to determine who was going to Del's Cafe?

A. That would be pretty silly, when I had 8 feet of window, one side of my desk, from ceiling almost to floor length. I could see a small dog across the street.

(p. 382)

Q. Did you ever talk to anyone about closing the factory and moving it to Japan?

A. That is absurd.

(p. 384)

Q. Did you ever tell Judy Emery to needle or pick a fight with Sharon?

A. It's absolutely ridiculous. I certainly didn't.

Cross-examination

(p. 396-397)

Q. Do you recall that you had a conversation with Perri Nelson?

* * * *

A. That is right. She came by my desk and talked to me.

Q. This was after the meeting over at Del's Cafe?

A. I believe so.

* * * *

Q. Do you remember when it was in relation to the time that this bulletin was posted on your bulletin board?

A. These events are very, very close. It's a day here, a day there.

(p. 398)

Q. Well, just as a matter of fact, it was right after that meeting at Del's Cafe, wasn't it?

A. That wouldn't have any bearing on talking to her, would it?

Q. My question was: This was right after the meeting at Del's Cafe?

A. That is right, I presume it was.

(p. 405)

Q. Will you tell us what you told Bill with regard to discharging Sharon?

A. I told him to discharge her for insubordination.

Q. To you?

A. I didn't have to tell him who to.

(p. 407)

Q. My question is: Did you introduce her to your girls as "floorlady" or "foreman"?

A. I told them that Judy was in charge of quality control.

Louise Stewart, a witness for respondent, testified as follows on direct examination:

(p. 433)

Q. How long have you known Norma Emery?

A. Approximately 15 years.

* * * *

Q. Did Mrs. Emery come to you with complaints to pass on to Mrs. Remer?

A. At various times.

(p. 434)

Q. What employees did she complain about?

A. Well, various ones. Sharon, for one.

* * * *

Q. Did you pass the complaints on to Mrs. Remer?

A. I did.

Cross-examination

(p. 442-443)

Q. And you stated that Mrs. Emery complained to you about Sharon and others. Who were the others?

A. Well, there were several times on the night shift . . . I believe one of them was Helen Carmen, who later became Helen Desmuke.

Q. Were there others?

A. There were others

Q. Were these girls discharged?

A. I believe, I know that one or two of them were.

(p. 452-453)

Q. Do you know who attended the meeting at Del's Cafe?

A. I saw the employees go in the door, yes.

